

1  
2  
3 HON. STANLEY A BASTIAN  
4  
5  
6  
7  
8  
9

10  
11  
12  
13 UNITED STATES DISTRICT COURT  
14 WESTERN DISTRICT OF WASHINGTON  
15 AT SPOKANE  
16  
17  
18

19 VICTOR JAMES KAECH,  
20

21 Plaintiff,  
22

23 v.  
24

25 OCWEN LOAN SERVICING, LLC; U.S.  
26 BANK NATIONAL ASSOCIATION, AS  
TRUSTEE UNDER MORTGAGE POOLING  
AND SERVICING AGREEMENT DATED AS  
OF AUGUST 1, 2007 MASTR  
ASSETBACKED SECURITIES TRUST 2007  
HE-2 MORTGAGE PASS-THROUGH  
CERTIFICATES, SERIES 2007-HE2;  
FIDELITY NATIONAL TITLE INSURANCE  
COMPANY; and DOE DEFENDANTS 1  
through 20;

27 Defendants.  
28

29 Case No. 2:14-cv-00330  
30

31 PLAINTIFF'S MOTION FOR  
32 PRELIMINARY INJUNCTION TO  
33 ENJOIN THE NONJUDICIAL  
34 FORECLOSURE SALE  
35

36 HEARING DATE: 10/22/14 @ 11:30  
37 A.M.  
38

39 COMES NOW, Plaintiff Victor James Kaech hereby moves this Court for a Preliminary  
40  
41 Injunction in order to prevent the loss of his home to foreclosure.  
42

43 **FACTUAL ALLEGATIONS**  
44

45 Mr. Kaech is a resident of Wenatchee he built the house himself in 2001. He obtained a  
46 mortgage on the Residence from Decision One on or about May 21, 2007. In connection with  
47 that loan, he signed a Promissory Note which was payable to Decision One. He also signed a  
48

49  
50 PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION- 1  
51 2:14-cv-00330  
52

53 LAW OFFICES OF  
54 MELISSA A. HUELSMAN, P.S.  
55 705 SECOND AVENUE, SUITE 601  
56 SEATTLE, WASHINGTON 98104  
57 TELEPHONE: (206) 447-0103  
58 FACSIMILE: (206) 673-8220  
59

1 Deed of Trust which listed Decision One as the Lender and Defendant MERS as the purported  
2 “beneficiary”. However, Plaintiff maintains that none of the Defendants has the ability to alter  
3 the definitions provided for in the Deed of Trust Act by calling an entity such as Defendant  
4 MERS the “beneficiary” when, in fact, Defendant MERS is never the “beneficiary” of any  
5 rights under the Deed of Trust. Defendant MERS is not entitled to receive any of the monies  
6 from Mr. Kaech and is nothing more than a company that operates a computer system which  
7 keeps track of the supposed ownership of mortgage loans that are sold to securitized trusts.

8 *See, Declaration of Victor Keach in support of the Motion for Temporary Restraining Order,*  
9 which is on file with the Court (hereinafter “Kaech Dec.”).

10 Mr. Kaech owns and operated a construction company and as a result of the problems in  
11 the economy beginning in 2008, Mr. Kaech’s business fell off significantly and he began to  
12 experience very serious financial problems. He struggled to pay his business and personal  
13 expenses, but by the end of 2008, he had fallen behind on his mortgage payments and was  
14 facing a nonjudicial foreclosure sale. At that time, he was making his payments to Defendant  
15 Ocwen, his mortgage servicer, as he never made any payments directly to Decision One after  
16 obtaining the loan. He had received communications indicating that Ocwen was his loan  
17 servicer. Kaech Dec.

18 Mr. Kaech began talking to the representatives at the then loan servicer, HomEq, an  
19 entity that has since gone out of business, about how to obtain a loan modification in order to  
20 save his home. Mr. Kaech retained lawyers to try to help get a loan modification but had no  
21 luck. As it neared the auction date, he retained lawyers to try to help him get a loan  
22 modification, to no avail. Desperate to save all of the equity in his home, he borrowed money  
23 from family and friends to pay the arrears and that stopped the 2008 foreclosure sale. Kaech  
24  
25

1 Dec. But because Mr. Kaech had not been able to increase his actual income due to continued  
2 problems with the economy, he fell behind again in 2009. In October 2009, he received  
3 another default notice which scheduled an auction date in March 2010. He had some income  
4 by that point in the time and was submitting documentation to Defendant Ocwen showing that  
5 income. Nevertheless, he was told he was denied a loan modification. Apparently because he  
6 was applying for a loan modification, the 2010 foreclosure sale date was discontinued. He did  
7 not get definitive answers on his loan modification applications that were documenting his new  
8 and improved income. *Id.*

9  
10 In another effort at prevent the loss of his home and his equity therein, he retained the  
11 services of out of state lawyers and paid them several thousand dollars to get him a loan  
12 modification in April 2012. While he realizes now that he should have retained the services of  
13 a local attorney, he nevertheless provided them with the necessary documentation and worked  
14 with them to stop the foreclosure and get a loan modification. Those communications  
15 regarding the loan modification were sent to the loan servicer, Defendant Ocwen. Kaech Dec.

16  
17 It took months and months of submitting documents to Defendant Ocwen in order to  
18 obtain a loan modification. During this process, Mr. Kaech was advised that he did not qualify  
19 for a HAMP loan modification for unspecified reasons, but was told that he was being reviewed  
20 for an “in house” loan modification. In spite of the fact he was being reviewed for a loan  
21 modification, another nonjudicial foreclosure sale was started in 2012. *Id.*

22  
23 The documents that were used in support of the initiation of a new nonjudicial  
24 foreclosure in 2012 were the same as those used for the previous attempt at foreclosure. The  
25 Notice of Trustee’s Sale that was sent out on or about December 18, 2008 was issued by  
26 Regional Trustee Services, Inc. (“RTS”), the purported foreclosing trustee. RTS was not the

1 original trustee on the Deed of Trust that Mr. Kaech signed and he does not know how or by  
2 whom it was purportedly appointed as the “successor trustee” because it is almost impossible to  
3 locate the document in the records of Chelan County, Washington. There is no record available  
4 when searching under the Tax Parcel Number. The 2008 NOTS was recorded in the records of  
5 Chelan County, Washington on December 18, 2008. A true and correct copy of the first Notice  
6 of Trustee’s Sale is attached to the Declaration of Melissa A. Huelsman, Exhibit “A”, which is  
7 on file herein (“1<sup>st</sup> NOTS”).  
8

9 On or about December 18, 2009, in Sacramento County, California, a Joyce Nelson,  
10 Assistant Secretary for Defendant MERS executed an Assignment of Deed of Trust document  
11 as “nominee for Decision One Mortgage Company, LLC, its successors and assigns”. This  
12 Assignment purported to assign the interest in Mr. Kaech’s Deed of Trust to Defendant US  
13 Bank Trust. However, by December 18, 2009, Decision One has ceased to exist and Mr. Kaech  
14 alleges, based upon information and belief, that no one at Decision One or at the U.S. Bank  
15 Trust instructed Ms. Nelson to execute the Assignment. Rather, he maintains that Ms. Nelson  
16 was an employee of HomEq who merely signed the document in order to give the false  
17 impression that she had the authority to do so in order to facilitate the attempt at nonjudicially  
18 foreclosing. Huelsman Dec., Exhibit “C”.  
19

20 On or about January 6, 2010, RTS again initiated another Notice of Trustee’s Sale  
21 starting another nonjudicial foreclosure with a sale date scheduled for April, 9, 2010. This  
22 document was recorded in the records of Chelan County, Washington on January 7, 2010. The  
23 third attempt at a nonjudicial foreclosure was begun in 2012. On or about June 19, 2012 an  
24 employee of RTS signed a new Notice of Trustee’s Sale setting an auction date of September  
25 21, 2012 and that document was recorded in the records of Chelan County, Washington on  
26  
27

1 June 20, 2012. This foreclosure sale was discontinued on January 28, 2013 with the recording  
2 of a Notice of Discontinuance. Huelsman Dec., Exh. "B" and "D".

3 Mr. Kaech disputes that he was not qualified for a HAMP modification at this time, but  
4 he was finally offered an "in house" loan modification from Defendant Ocwen. The Loan  
5 Modification was sent to him at the end of October 2012, and required a payment to be made  
6 on or before November 1, 2012. Mr. Kaech was also required to sign and return the Loan  
7 Modification Agreement to Defendant Ocwen. He timely returned the agreement and made the  
8 required payment. The Loan Modification Agreement indicated that if he complied with its  
9 terms by sending in the agreement and making the payment, as of December 1, 2012, the  
10 modification would become effective. Those terms included that the principal balance on the  
11 loan would become \$347,740.47 and that \$57,990.47 of the balance would be "deferred". In  
12 other words, no interest would be charged on that amount and so long as he made all required  
13 payments under the Loan Modification Agreement, the "deferred" amount would be eliminated  
14 entirely in three years. The new principal amount of \$288,750.00 would accrue interest at  
15 2.0% for the remainder of the loan term. The new monthly payment on the loan was supposed  
16 to be \$1,729.58, which represented \$1,244.17 for principal and interest and \$485.41 for escrow.  
17 While there was an indication that the escrow amount could change based upon changes to the  
18 amounts owed for property taxes and insurance in the future, it was represented as being  
19 accurate as of the date of the Loan Modification. Further, there was no indication in the Loan  
20 Modification document that there was any arrears on the escrow account and in fact, the arrears  
21 on the escrow account were presumably being added to the principal balance on the loan.  
22  
23 Kaech Dec.  
24

25 Within a couple of weeks of accepting the Loan Modification and making the first  
26

1 payment, Mr. Kaech received a letter from Defendant Ocwen asserting that he was delinquent  
2 on his payments to Defendant Ocwen and that his new escrow payment was going to be  
3 \$762.60. This caused the new monthly payment to be \$2,119.77. This amount was not  
4 affordable for Mr. Kaech. Moreover, the statement from Defendant Ocwen dated November  
5 30, 2012 demanding this increased payment showed calculations regarding the loan balance  
6 that was completely inconsistent with the terms of the Loan Modification Agreement that he  
7 had just entered into, including an alleged negative escrow balance of \$7,128.37 or perhaps,  
8 \$1,424.17. In addition, late charges, recording fees and “sheriff’s fees/commissions” were  
9 added to the loan balance. These amounts should have been recorded in the modified loan  
10 balance. Kaech Dec.

12 In essence, even before it was supposed to finalize the permanent loan modification,  
13 Defendant Ocwen breached the terms of the contract and asserted that Mr. Kaech owed new  
14 amounts that were not disclosed in connection with the loan modification. Mr. Kaech tried to  
15 reach someone at Defendant Ocwen to explain what was going on but could not get a coherent  
16 response. He wrote letters asking for clear information and an explanation for why his payment  
17 had changed in less than 30 days and while he received letters confirming receipt of his letters,  
18 he never received any reasonable explanation. Kaech Dec.

20 Mr. Kaech tried to make the regular payments due under the terms of the Loan  
21 Modification Agreement but was not allowed to do so on Defendant Ocwen’s online account  
22 program. Thus, he was prevented by Defendant Ocwen from continuing to make the payments  
23 due under the terms of the Loan Modification Agreement. The lawyers he had representing  
24 him also tried to get Defendant Ocwen to clear up the matter and give an explanation for what  
25 was happening, to no avail. Since November 2012 Mr. Kaech has been trying to get Defendant  
26

1 Ocwen to simply honor the Loan Modification that it provided to him but has been unable to do  
2 so because of the actions of Defendant Ocwen, who at all times, was apparently acting as the  
3 agent for Defendant US Bank Trust. Kaech Dec.

4 On or about July 29, 2013, an employee of Defendant Ocwen named Jami Dorobiala,  
5 “Contract Management Coordinator” signed an Appointment of Successor Trustee document  
6 on behalf of Defendant Ocwen, who was purportedly acting as “servicer” for Defendant U.S.  
7 Bank Trust. The document purported to appoint Defendant Fidelity as the foreclosing trustee.  
8 However, Ms. Dorobiala was NOT an employee of Defendant U.S. Bank Trust and so her  
9 signature purporting to appoint Defendant Fidelity is invalid. RCW 61.24.010(2) allows  
10 ONLY a “beneficiary” (defined as the “noteholder” under RCW 61.245.005(2)) to appoint a  
11 successor trustee. Thus, on its face, this document was invalid. Nevertheless, Defendant  
12 Fidelity caused this document to be recorded in the records of Chelan County, Washington on  
13 August 13, 2013. Huelsman Dec., Exh. “E”.

16 Apparently in reliance upon its purported authority as the “trustee”, Defendant Fidelity  
17 issued a Notice of Default document to Mr. Kaech on or about October 18, 2013. In that  
18 document, Defendant Fidelity demanded payment in order to prevent the foreclosure sale  
19 which included amounts for “expenses/fees” of \$752.23, which Plaintiff maintains were  
20 unearned and inflated; “corporate advances” of \$3,071.20, which Plaintiff maintains were  
21 unearned and inflated; and inspections in the amount of \$121.00. Defendant Fidelity also  
22 demanded a “trustee fee” of \$700.00 which is absolutely unreasonable and unearned; a trustee’s  
23 sale guarantee charge of \$738.20, which Plaintiff maintains is inflated as Defendant Fidelity  
24 did not pay itself this amount; posting of the NOD charges in the amount of \$125.00, which is  
25 wildly inflated and unreasonable; a charge for recording the “Substitution of Trustee”  
26

1 document in the amount of \$18.00 which is improper and inflated; and certified maile fees of  
2 \$100.00, which is inflated. All of these amounts are unreasonable, inflated and unearned and  
3 Mr. Kaech disputes the validity thereof. Kaech Dec., Exh. "3".

4 In addition, the NOD document did not list a separate address for Defendant U.S. Bank  
5 Trust, and only listed the contact information for Defendant Ocwen, the servicer. This is an  
6 express violation of the requirements of the DTA. Defendant Fidelity also violated the DTA by  
7 including a toll telephone number for California on the NOD as the means of contacting  
8 Defendant Fidelity, which is an express violation of the requirements of the DTA as well.  
9 There is another California phone number listed as belonging to "Baby Agnes Lombo". A  
10 phone number with a (206) area code is also listed, but as was made clear when Mr. Kaech  
11 tried to get information about the foreclosure by calling that number on October 1, 2014, he  
12 was passed off by a staff person named Dave Lawson (presumably in Seattle) to communicate  
13 with people in California. Mr. Lawson advised Mr. Kaech that he did not have any necessary  
14 information and that he would have to speak with the California employees. This is not  
15 consistent with the requirements of the DTA. So, not only have Defendant Fidelity not been  
16 appointed as a trustee under Washington law but it purported to act as the foreclosing trustee,  
17 the NOD did not comply with the requirements of the DTA and it tried to charge Plaintiff  
18 unreasonable, unearned and inflated charges in order to avoid the sale. *Id.*

19 Presumably in reliance upon the invalid Appointment of Successor Trustee document,  
20 Defendant Fidelity caused to be served upon Mr. Kaech and to be recorded in the records of  
21 Chelan County, Washington a Notice of Trustee's Sale setting the date for foreclosure as  
22 October 10, 2014 at 10:00 a.m. The document was signed by John Catching, an employee of  
23 Defendant Fidelity located in California with a California phone number. There was a (206)  
24

1 area code phone number also listed – the same as on the NOD – at which no one has any  
2 information about Mr. Kaech's foreclosure sale. Included with the NOTS document was a  
3 Notice of Foreclosure which outlined the fees that Defendant Fidelity was demanding be paid  
4 in order to avoid foreclosure. It presumably included the amounts being demanded in the NOD  
5 but those amounts had increased and they remain contested by Mr. Kaech. General  
6 "expenses/fees" were listed as \$300.00 but the certified mail charge is now \$6.53. There are  
7 inspection and valuation fees of \$178.00. The "trustee's fee" is now listed as \$900.00, which is  
8 wildly inflated, unearned and unreasonable. The posting of the NOD is now listed as \$50.00  
9 but certified mail charges listed as \$120.00. All of these are unearned, inflated and  
10 unreasonable. The trustee sale guarantee fee was similarly inflated and unreasonable. Posting  
11 of the Notice of Sale was listed as being \$120.00 and the publication costs were identified as  
12 \$1,000.00. These are unearned, inflated and unreasonable. The purported certified mailing  
13 costs for the NOTS is identified as \$180.00. That charge is preposterous and unreasonable.  
14 Similarly, the charge of \$62.00 for recording of the "rescission of NOS" is inflated and  
15 unreasonable. Mr. Kaech disputes the validity of all of these charges, as well as the monthly  
16 payment calculations included on both the NOD and the NOTS. Kaech Dec.  
17  
18

19 Mr. Kaech maintains that he has significant equity in his home which may be lost as a  
20 result of the pending foreclosure sale. He believes that he qualifies for a loan modification  
21 under the HAMP Guidelines and should have been properly reviewed the first time. Further,  
22 he maintain that at the very least, the Loan Modification Agreement that he did enter into  
23 should be enforced and he should have been allowed to comply with its terms, and earn the  
24 principal reduction that was included in the terms of the Agreement. He maintains that he is  
25 being precluded from obtaining the benefit of the Loan Modification offered by Defendant  
26  
27

1 Ocwen because it will make more money as the servicer if the foreclosure sale occurs. This is  
2 clear from all of the additional amounts that are being added to the loan constantly by all of the  
3 Defendants herein. He also maintains, as identified above, that the foreclosure is being  
4 improperly conducted as it is not being done by the “beneficiary” as defined under the Deed of  
5 Trust Act. RCW 61.24.005(2). Kaech Dec.

6 Mr. Kaech has suffered financial damages as a result of the actions of the Defendants  
7 herein, including the fees he paid for an investigation of his claims, the fees he paid in  
8 association with trying to get Ocwen to adhere to the terms of the Loan Modification  
9 Agreement that it provided him, the attorneys’ fees and costs that he has incurred and will incur  
10 in the future in order to get injunctive relief, as well as his costs associated with traveling to  
11 meet with a lawyer to investigate his claims and the parking costs associated therewith. He has  
12 also suffered harm to his credit for the additional time period that he has been unable to make  
13 his mortgage payments and for the initiation of yet another foreclosure sale that is in the public  
14 records and on his credit. Kaech Dec.

17 **II. ISSUES PRESENTED**

18 Under RCW 61.24, *et seq.*, is Mr. Kaech entitled to a temporary restraining order when:

19 (1) The Defendants have made numerous false representations about the owner of  
20 the loan in an attempt to expedite the foreclosure process. These Defendants have repeatedly  
21 asserted and created documents falsely asserting that Defendant Ocwen is the “beneficiary” or  
22 otherwise has legal authority under the Deed of Trust Act to act as a “beneficiary” when it is  
23 not the noteholder. The owner of the loan and the noteholder is Defendant U.S. Bank Trust.

25 (2) Defendant Fidelity has not been properly appointed as the foreclosing trustee by  
26 the holder of the Note and it is demanding amounts in connection with the foreclosure that are

1 unearned, inflated and unreasonable. Thus, can a foreclosure proceed when it is being  
2 conducted by an entity that does not have the legal authority under the requirements of the  
3 DTA to so act?

4 (3) Plaintiff has been prevented from an opportunity to avoid foreclosure by the  
5 misrepresentations of the Defendants, as described more particularly herein. Mr. Kaech  
6 maintains that he should have been entitled to the benefits of the Loan Modification that he  
7 entered into in November 2012.

### 9 **III. EVIDENCE RELIED UPON**

10 This motion is based on the moving papers, Declarations of Victor James Kaech and  
11 Melissa A. Huelsman filed in support of the Motion for Temporary Restraining Order, as well  
12 as the pleadings and documents on filed herein.

### 13 **IV. ARGUMENT**

14 1. The Deed of Trust Act contains provisions allowing for enjoinder of a foreclosure sale  
15 under more liberal circumstances than the usual standard for awarding of such injunctive relief.

16 Mr. Kaech maintains that the Deed of Trust Act contains language which allows for this  
17 Court to enter a temporary restraining order and/or preliminary injunction order under less  
18 rigorous standards than those outlined in RCW 7.40.020, or those provided for under FRCP 65,  
19 which now requires a "probability" of irreparable harm. *Winter v. Ntl. Resources Defense*  
20 *Council*, 555 U.S. 7, 129. S.Ct. 365 (2008). The Deed of Trust Act specifically states that:

21 **Nothing contained in this chapter shall prejudice the right of the borrower,  
22 grantor, any guarantor, or any person who has an interest in, lien, or claim of lien  
23 against the property or some part thereof, to restrain, on any proper legal or  
24 equitable ground, a trustee's sale.** The court shall require as a condition of granting  
25 the restraining order or injunction that the applicant pay to the clerk of the court the  
26 sums that would be due on the obligation secured by the deed of trust if the deed of trust  
27 was not being foreclosed:

(a) In the case of default in making the periodic payment of principal, interest, and reserves, such sums shall be the periodic payment of principal, interest, and reserves paid to the clerk of the court every thirty days.

(b) In the case of default in making payment of an obligation then fully payable by its terms, such sums shall be the amount of interest accruing monthly on said obligation at the nondefault rate, paid to the clerk of the court every thirty days.

RCW 61.24.130 (emphasis added). This portion of the statute makes clear that the standard for obtaining a temporary restraining order and/or preliminary injunction to stop a foreclosure is lower than the standard that might otherwise be applied to other scenarios. The statute also allows this Court to enjoin the sale based upon any “**proper legal or equitable ground**”.

RCW 61.24.130 (emphasis added)

2. Mr. Kaech would be entitled to injunctive relief even under the standard for issuance of ordinary temporary restraining orders.

Even if this Court were to consider whether to apply the analysis required under RCW 7.40.020 (since this case is a state law case), Mr. Kaech can meet the burden for obtaining relief in that fashion. Under RCW 7.40.020:

When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief...consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff...an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion.

RCW 7.40.020.

The Washington Supreme Court first addressed issuance of a preliminary injunction in *State ex rel. Miller v. Lichtenberg*, 4 Wn. 407, 411 (1892), and later clarified its position in *Blanchard v. Golden Age Brewing Co.*, 188 Wn. 396, 415 (1936). The *Blanchard* Court held that, "[T]he object and purpose [of a preliminary injunction] is to preserve and keep things in

1       *statu quo* until otherwise ordered and to restrain an act which, if done, would be contrary to  
2       equity and good conscience." The Court provided further clarification in *Isthmian Steamship*  
3       *Co. v. National Marine Engineers' Beneficial Assoc.*, 41 Wn.2d 106, 117 (1952), holding that  
4       the moving party must show a "clear legal or equitable right and a well-grounded fear of  
5       immediate invasion of that right." This standard was reaffirmed in *Tyler Pipe Industries, Inc.*  
6       *v. Dept. of Revenue*, 96 Wn.2d 785 (1982) and *Washington Federation of State Emp. v. State*,  
7       99 Wn.2d 878 (1983). Thus, in order to obtain an injunction in most circumstances, plaintiffs  
8       must show that: (1) they have a clear legal or equitable right; (2) that they have a well-  
9       grounded fear of immediate invasion of that right, and (3) that the acts complained of are either  
10       resulting in or will result in actual and substantial injury to them. *Kucera v. State, Dept. of*  
11       *Transportation*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). Such criteria is evaluated by  
12       balancing the relative interests of the parties, and if appropriate, the interests of the public. *Id.*  
13       Ultimately, the decision to grant a temporary restraining order and/or a preliminary injunction  
14       is within the sound discretion of the trial court, with such discretion to be exercised according  
15       to the circumstances of each particular case. *Washington Fed'n of State Employees v. State*, 99  
16       Wn.2d 878, 887 (1983) (citations omitted).

19       Similarly, under the federal rules and case law, *Winter v. Ntl. Resources Defense*  
20       *Council*, Mr. Kaech meets the criteria because he can show irreparable harm if the sale is not  
21       enjoined, as he may well waive his right to try to recover title to his home. *See*, RCW  
22       61.24.127.

24       The Deed of Trust Act was amended in 2009 and the new provisions allow for certain  
25       claims to be brought even after a foreclosure sale, but those claims may only be for money  
26       damages and it is only those claims based upon fraud or misrepresentation, claims under RCW

1 19, and for improprieties in the foreclosure sale process. RCW 61.24.127. Nevertheless, it is  
2 still important that Mr. Kaech have the foreclosure sale stopped so that he can pursue all of his  
3 claims and seek enforcement of the terms of the Loan Modification Agreement that he entered  
4 into in November 2012. If the foreclosure proceeds, Mr. Kaech believes that he will lose the  
5 equity in the Residence, a house he built himself, as well as the place that has been his home  
6 for the last 13 years.  
7

8       A.     Mr. Kaech is Likely To Prevail on The Merits of This Case and Thus Has  
9     Established a Clear Legal Right to Such Relief.

10      In order to determine whether a party has a clear legal or equitable right, the Court must  
11 analyze the moving party's likelihood of prevailing on the merits. *Washington Fed'n of State*  
12 *Employees*, 99 Wn.2d at 888 (*citing Tyler Pipe Indus. v. Department of Revenue*, 96 Wn.2d  
13 785, 793 (1982)). For the reasons discussed below, Plaintiff is likely to prevail on each of his  
14 claims in this action, and thus has established a clear legal right to such relief. But most  
15 importantly, it is very obvious that the foreclosure is being done by the loan servicer,  
16 Defendant Ocwen, which is NOT by the Note Holder and "beneficiary" under the Deed of  
17 Trust Act, Defendant U.S. Bank Trust. Further, Defendant Ocwen is attempting to force a  
18 foreclosure in violation of the terms of the Loan Modification Agreement that it provided him  
19 in November 2012, and it is attempting to obtain payment of amounts that are not due and  
20 owing.  
21

22       B.     Mr. Kaech is likely to prevail on his Consumer Protection Act claims.

23      A plaintiff who alleges a violation of the Washington Consumer Protection Act must  
24 prove five elements: "(1) an unfair or deceptive act or practice; (2) occurring in trade or  
25 commerce; (3) public interest impact; (4) injury to plaintiff in his or their business or property;  
26  
27

1 (5) causation.” *Hangman Ridge Training Stables v. Safeco Title Ins. Co*, 105 Wn.2d 778, 780,  
2 (1986). The Defendants have committed numerous unfair and deceptive acts and practices, as  
3 described in great detail in the Facts portion of this Motion and in the Complaint. Given the  
4 complete and utter disregard that the Defendants have shown for complying with the Deed of  
5 Trust Act in this case, it is very likely that Mr. Kaech will be able to demonstrate to a trier of  
6 fact that this is part of a pattern and practice and very likely to be repeated.  
7

8       C.     Mr. Kaech is Likely to Prevail Upon his Claim Challenging the Amounts being  
9     Demanded in Connection with the Non-Judicial Foreclosure Sale.

10      Defendant Fidelity is required to comply with its duty of adherence to the statute and it  
11 has breached that duty to Mr. Kaech by wrongfully attempting to conduct an improper  
12 foreclosure sale and for demanding payments of amounts that are unearned, inflated and  
13 unreasonable. Defendant Fidelity violated the requirements of the DTA, codified at RCW  
14 61.24, *et al.*, by not complying with that statute in the conduct of the foreclosure sale, as more  
15 particularly described above. Mr. Kaech has established that he is likely to prevail on his  
16 claims related to the demands for payment given the wildly inflated amounts that have been  
17 demanded by Defendant Fidelity, and the fact that it has not even been appointed as a trustee in  
18 compliance with the requirements of the DTA, but is demanding payment for “trustee fees”.  
19  
20 RCW 61.24.090(2).

21      Mr. Kaech is entitled to receive an order temporarily restraining the completion of the  
22 foreclosure sale commenced by the purported foreclosing trustee because the trustee lacks  
23 authority to conduct the sale for multiple reasons, is demanding amounts that are not permitted  
24 under the statute and because he is required to take this action in order to be certain that he has  
25 preserved his claims. Mr. Kaech is likely to prevail upon the merits, as outlined above in the  
26  
27

Factual portion of this Motion, which is supported by the evidence presented through the supporting Declaration, and for all of these reasons he should be granted a temporary restraining order.

D. Mr. Kaech likely to prevail on the intentional and negligent misrepresentations claims.

The Defendants made numerous false representations in connection with the foreclosure sale in an attempt to avoid compliance with the requirements of the Deed of Trust Act and in order to speed up the foreclosure of his home, solely for the financial benefit of Defendants Ocwen, U.S. Bank Trust and MERS. Additionally, Defendant Fidelity has made assertions regarding amounts due on the loan which are unearned, inflated and unreasonable. Thus, he is likely to prevail upon these claims at trial given the clear violations of Washington state laws, as more particularly described above.

## VI. CONCLUSION

Based on the foregoing, Mr. Kaech hereby requests that this Court enter an order temporarily restraining Defendant Fidelity from completing the foreclosure of the Residence. He requests that this Court set a hearing for a preliminary injunction. Mr. Kaech understands that he is required to make monthly payments to the Court Registry pursuant to the requirements of the DTA in the amount of the regular mortgage payment owing each month and will do so. However, he is not required to post a bond under the provisions of the DTA. If the Legislature had intended Courts to have to look at other statutes in connection with enjoining a foreclosure sale, it would not have used the language it did in the statute, which makes clear that a sale can be enjoined on any equitable ground. For these reasons, the Court should grant the request for a temporary restraining order and set the matter for hearing on the

1 motion for preliminary injunction.

2 Dated this Monday, October 20, 2014.

3  
4 LAW OFFICES OF MELISSA A. HUELSMAN, P.S.  
5  
6 */s/ Melissa A. Huelsman*  
7 Melissa A. Huelsman, WSBA #30935  
Attorney for Plaintiff  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

## **CERTIFICATE OF SERVICE**

I, Pamela Hamilton, declare under penalty of perjury as follows:

1. I am over the age of eighteen years, a citizen of the United States, not a party herein, and am competent to testify to the facts set forth in this Declaration.

2. That on the Monday, October 20, 2014, I caused the foregoing document attached to this Certificate of Service plus any supporting documents, declarations and exhibits to be served upon the following individuals via the methods outlined below:

<p>Erin M. Stines, WSBA #31501  Fidelity National Law Group  Attorney for Defendant Fidelity  1200 – 6th Avenue, Suite 620  Seattle, WA 98101  Emails: erin.stines@fnf.com  Shbien.cross@fnf.com</p>	<p><input checked="" type="checkbox"/> Legal Messenger (next day)  <input checked="" type="checkbox"/> Electronic Mail (same day)  <input type="checkbox"/> Federal Express  <input type="checkbox"/> Other: _____</p>
<p>Sakae S. Sakai  Robert W. Norman, Jr.  Houser &amp; Allison APC  Attorneys for Defendant Ocwen, MERS &amp;  U.S. BANK, N.A. as Trustee...  1601 5th Ave, Ste 850  Seattle, WA 98101-3672  Email: ssakai@houser-law.com  rnorman@houser-law.com</p>	<p><input checked="" type="checkbox"/> Legal Messenger (next day)  <input checked="" type="checkbox"/> Electronic Mail (same day)  <input type="checkbox"/> Federal Express  <input type="checkbox"/> Other: _____</p>

I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is both true and correct.

Dated Monday, October 20, 2014, at Seattle, Washington.

/s/ *Pamela Hamilton*  
Pamela Hamilton, Paralegal